

STATE OF CALIFORNIA

DEPARTMENT OF INSURANCE

45 Fremont Street, 24th Floor

San Francisco, California 94105

AMENDED FINAL STATEMENT OF REASONS

Date: July 23, 2004 RH03028987

REGULATIONS CONCERNING DISABILITY INSURANCE ASSESSMENT PURSUANT TO INSURANCE CODE SECTION 1872.85

UPDATE OF INITIAL STATEMENT OF REASONS

Pursuant to Insurance Code Section 1872.85, Insurance Commissioner John Garamendi proposes to add to California Code of Regulations, Title 10, Chapter 5, Subchapter 9 the new article 8, entitled "Disability Insurance Assessment". Insurance Code Section 1872.85 permits the Commissioner to collect an annual fee of up to ten cents for each insured under an individual or group disability insurance policy. The purpose of the assessment is to fund increased investigation and prosecution of fraudulent claims made against these policies.

Public comment was accepted and a public hearing was held on this proposed regulation on April 12, 2004. After considering the public comment during the initial 45 day period, initially the Commissioner decided to amend the proposed regulation to take into consideration pending legislation before the Legislature. After receiving additional public comment during the subsequent 15 day public comment period, the Commissioner decided to delete the new language because it became clear that the enabling statute, Insurance Code Section 1872.85, would not be amended prior to the promulgation of the proposed regulation. After a detailed review of the public comments, as indicated elsewhere in this rulemaking file, the Commissioner has determined that the regulation should be amended to improve the clarity of the regulation. As a result, the regulation still sets a date for the determination of the number of insureds affected by the assessment, but it no longer sets a specific date for payment of the assessment. An additional 15 day public comment period expired on July 15, 2004. Because the Initial Statement of Reasons, with one small exception, still fully and accurately reflects the views of the Department of Insurance, the Commissioner incorporates by this reference the Initial Statement of Reasons.

IDENTIFICATION OF STUDIES

In the Initial Statement of Reasons, the Department of Insurance did not identify any studies that were relied upon to justify the promulgation of this regulation. However, during the pendency of the regulatory process, the Department of Insurance filed a finance letter with the Department of Finance detailing the amount of revenue expected to be raised by the assessment created by the regulation and explaining how the funds from the assessment would be used. Based upon its analysis, the Department of Insurance believes that the assessment would raise \$2.6 million. \$1.3 million of the assessment funds would be distributed to local district attorneys, according to population, for investigation and prosecution of health insurance fraud cases. The remaining \$1.3 million would be used to fund the investigative efforts of ten Fraud Investigators and two Supervising Fraud Investigators. The investigators would be stationed throughout the State at

various Department of Insurance offices. These investigators would form the core group of a specialized task force that the Department of Insurance would deploy to actively investigate and prosecute disability and health care insurance fraud.

SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING THE INITIAL NOTICE PERIOD OF FEBRUARY 26 THROUGH APRIL 12, 2004, THE 15 DAY NOTICE PERIOD CONCERNING PROPOSED CHANGES FROM APRIL 16, 2004 THROUGH MAY 3, 2004, AND THE 15 DAY NOTICE PERIOD CONCERNING PROPOSED CHANGES FROM JUNE 30, 2004 THROUGH JULY 15, 2004

Summary and Response to Comments Re: Section 2698.95

Comment No. 1:

Commentator: Anne Eowan, Association of California Life and Health Insurance Companies

Date of Comment: March 22, 2004

Type of Comment: Written

Summary of Comment:	Response to Comment: The Commissioner has considered the comment and has not changed the proposed regulation in response to the comment.
(a) Clarification of Purpose of Disability Insurance Assessment The commentator requests that the Commissioner change the proposed regulation to clarify what the Disability Insurance Assessment funds will be used for. The commentator's grounds are that the regulation as previously written did not specify what the funds would be used for.	(a) Clarification of Purpose of Disability Insurance Assessment After considering the comment, the Commissioner has not accepted the proposed language change to the proposed regulation. The proposed change offered by the commentator cannot be effected until the Legislature amends the enabling statute, Insurance Code section 1872.85.

Comment No. 2:

Commentator: Douglas A. Lutgen, CSAA Inter-Insurance Bureau

Date of Comment: April 12, 2004

Type of Comment: Written

Summary of Comment:	Response to Comment: The Commissioner has considered the comments and has not changed the proposed regulations in response
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	to the comment.
<p>(a) The Proposed Regulation Improperly Separates Disability Insurers from Other Entities Liable for Any Loss Due to Health Insurance Fraud</p> <p>The commentator asserts that the proposed regulation improperly separates disability insurers from other entities liable for any loss due to health insurance fraud. In particular, the commentator asserts that the proposed regulation would create a situation where a subset of disability insurers who do not write health insurance would be assessed to fund the increased investigation and prosecution of fraudulent health insurance claims.</p>	<p>(a) The Proposed Regulation Improperly Separates Disability Insurers from Other Entities Liable for Any Loss Due to Health Insurance Fraud</p> <p>After considering the comment, the Commissioner has decided to retain the language contained in the proposed regulation because the language follows the language of the enabling statute, Insurance Code section 1872.85. The Commissioner believes that if there is any ambiguity caused by the language of Insurance Code section 1872.85, that ambiguity must be clarified by the Legislature.</p>
<p>(b) The Proposed Regulation's Creation of a \$.10 Assessment Would Be Confiscatory and the Legislature Did Not Intend for the Assessment to Be Applied to Low Premium Policies.</p> <p>The commentator asserts that the proposed regulation's \$.10 assessment would be confiscatory. Further, the commentator asserts that the Legislature, in enacting Insurance Code section 1872.85, contemplated that the assessment would only apply to insurers actually issuing health insurance policies and that assessment would only be applied to policies that had sufficient premium to avoid creating a confiscatory assessment. In particular, the commentator points out that the assessment would constitute nearly half of the total premiums for its accidental death and dismemberment insurance product.</p>	<p>(b) The Proposed Regulation's Creation of a \$.10 Assessment Would Be Confiscatory and the Legislature Did Not Intend for the Assessment to Be Applied to Low Premium Policies.</p> <p>After consider the comment, the Commissioner has decided to retain the language concerning the amount of the assessment. The Commissioner has found no evidence supporting the commentator's assertion that the Legislature had contemplated that the assessment would apply only to insurers actually issuing health insurance policies or that the assessment would only be applied to policies that had sufficient premium to avoid creating a confiscatory assessment. Had the Legislature had these concerns, the Commissioner believes that the Legislature would have created specific language to address these issues into the statute.</p>

<p>(c) The Proposed Regulation Improperly Applies an Assessment Against Travel-Related Accident Policies Because Such Policies Do Not Meet the Definition of Health Insurance and Thus Do Not Fall Within the Scope of Insurance Code Section 1872.85</p> <p>The commentator asserts that proposed regulation improperly makes an assessment against travel-related accident policies. In addition, such policies do not meet the definition of health insurance contained in Insurance Code section 106.</p>	<p>(c) The Proposed Regulation Improperly Applies an Assessment Against Travel-Related Accident Policies Because Such Policies Do Not Meet the Definition of Health Insurance and Thus Do Not Fall Within the Scope of Insurance Code Section 1872.85</p> <p>After considering the comment, the Commissioner has decided to retain the original language of the proposed regulation. It is the Commissioner's position that Insurance Code section 1872.85 permits an assessment to be made against all disability insurers. Since Insurance Code section 1872.85 was enacted in 1991, the definition of health insurance contained in Insurance Code section 106(b) does not apply.</p>
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Comment No. 3:

Commentator: Eugene R. Anderson, Anderson Kill & Olick, P.C.

Date of Comment: April 12, 2004

Type of Comment: Written

<p>Summary of Comment:</p>	<p>Response to Comment: The Commissioner has considered the comment and has not changed the proposed regulations in response to the comment.</p>
<p>(a) The Proposed Regulation Constitutes a Special Interest Regulation That Benefits Only One Company</p> <p>The commentator asserts that the proposed regulation will benefit one company, UnumProvident, by favoring insurers over policyholders.</p>	<p>(a) The Proposed Regulation Constitutes a Special Interest Regulation That Benefits Only One Company</p> <p>After considering this comment, the Commissioner has elected not to change the language of the proposed regulation. There is no evidence that the assessment created by this proposed regulation will benefit any one party more than anyone else. In addition, the assessment proceeds will fund investigations which will not be limited to just policyholders suspected of making a fraudulent claim. Other parties, such as medical providers, may be investigated as well.</p>

Comment No. 4:

Commentator: Douglas A. Lutgen, CSAA Inter-Insurance Bureau

Date of Comment: April 12, 2004

Type of Comment: Oral Testimony

Summary of Comment:	Response to Comment: The Commissioner has considered the comment and has not changed the proposed regulations in response to the comment.
<p>(a) Insurance Code Section 106 Must Be Read to Mean That Accidental Death and Dismemberment Policies Are Not Included in the Definition of Health Insurance. As a Result, Accidental Death and Dismemberment Policies Should Not Be Assessed Pursuant to the Proposed Regulation. In Addition, Accidental Death and Dismemberment Policies Are Not Subject to Many Fraudulent Claims</p> <p>The commentator asserts that Insurance Code section 106 takes accidental death and dismemberment policies outside the scope of health insurance. The commentator further asserts that the enactment of Insurance Code section 106 did not create any new categories, but was merely a restatement of existing California law. The commentator asked that the proposed regulation be amended to read: "Each admitted disability insurer that provides health insurance as defined in Insurance Code 106 ...". In addition, the commentator contends that accidental death and dismemberment policies have low premiums, infrequent claims and modest benefits. As a result, very few fraudulent claims are made because death or dismemberment is relatively easy to prove.</p>	<p>(a) Insurance Code Section 106 Must Be Read to Mean That Accidental Death and Dismemberment Policies Are Not Included in the Definition of Health Insurance. As a Result, Accidental Death and Dismemberment Policies Should Not Be Assessed Pursuant to the Proposed Regulation. In Addition, Accidental Death and Dismemberment Policies Are Not Subject to Many Fraudulent Claims</p> <p>After considering this comment, the Commissioner has decided not to change the proposed regulation. Insurance Code section 106 is clear on its face that its health insurance definition would only affect statutes enacted on or after January 1, 2002. Since Insurance Code section 1872.85 was enacted in 1991, it is clear that Insurance Code section 106's health insurance definition does not apply. If the Legislature had meant for the definition to apply to Insurance Code section 1872.85, the limitation to statutes enacted on or after January 1, 2002 would not have been included in the text of Insurance Code section 106. Adding the proposed language would appear to be an attempt to avoid the January 1, 2002 limitation set by the Legislature. Such a change should be made by the Legislature, not by regulation. Concerning the nature of accidental death and dismemberment policies, the Commissioner has seen no indication that the Legislature in enacting Insurance Code sections 1872.85 and 106 intended to exempt such policies from the assessment authorized by Insurance Code section 1872.85.</p>

<p>(b) Insurance Code Section 1872.85 Was Intended to Apply Only to Disability Insurers Liable for Any Loss Due to Health Insurance Fraud</p> <p>The commentator asserts that Insurance Code section 1872.85 should be interpreted to mean that the statute should only apply to disability insurers who are liable for any loss due to health insurance fraud. The commentator refers to the first sentence of Insurance Code section 1872.85 which states: “Every admitted disability insurer or other entity liable for any loss due to health insurance fraud doing business in this state shall pay an annual fee to be determined by the commissioner, but not exceed ten cents (\$0.10) annual for each insured under an individual or group insurance policy it issues in this state, in order to fund increased investigation and prosecution of fraudulent health insurance claims.”</p>	<p>(b) Insurance Code Section 1872.85 Was Intended to Apply Only to Disability Insurers Liable for Any Loss Due to Health Insurance Fraud</p> <p>After considering this comment, the Commissioner decided not to change the proposed regulation. It is the Commissioner’s interpretation that Insurance Code section 1872.85 applies to all admitted disability insurers, not just those insurers who issue health insurance policies. The Commissioner bases his interpretation on the state of the law at the time that Insurance Code section 1872.85 was enacted and the subsequent enactment of Insurance Code section 106.</p>
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Comment No. 5:

Commentator: Douglas A. Lutgen, CSAA Inter-Insurance Bureau

Date of Comment: May 3, 2004

Type of Comment: Written (email)

<p>Summary of Comment:</p>	<p>Response to Comment: The Commissioner has considered the comment and has changed the proposed regulations in response to the comment.</p>
<p>(a) The New Language in the Proposed Regulation that Resulted from a Previous Public Comment is Not Supported by the Enabling Statute</p> <p>The commentator asserts that the addition of the language “for the purposes of the prosecution and investigation of disability insurance fraud pursuant to Insurance Code section 1872.85” is not supported by the enabling statute, Insurance Code section 1872.85.</p>	<p>(a) The New Language in the Proposed Regulation that Resulted from a Previous Public Comment is Not Supported by the Enabling Statute</p> <p>After considering this comment, the Commissioner has decided to delete the new language in the proposed regulation. While the new language was added in anticipation of the Legislature amending Insurance Code section 1872.85, the bill proposing the amendment is still pending before the Legislature.</p>

Comment No. 6:

Commentators: Anne Eowan, Association of California Life and Health Insurance Companies

Date of Comment: July 14, 2004

Type of Comment: Written (email)

Summary of Comment:	Response to Comment: The Commissioner has considered the comment and has not changed the proposed regulations in response to the comment.
<p>(a) The July 1 Date for Payment of the Annual Assessment Should Be Retained In the Proposed Regulation</p> <p>The commentator requests that the July 1 date for payment of the assessment be retained in the proposed regulation. In the alternative, the commentator suggests that some date be placed in the proposed regulation to give insurers notice of when the assessment will be payable. The commentator contends that the lack of a payment date creates an unnecessary hardship on insurers.</p>	<p>(a) The July 1 Date for Payment of the Annual Assessment Should Be Retained In the Proposed Regulation</p> <p>After considering this comment, the Commissioner has decided not to change the new language in the proposed regulation. The payment date was deleted in attempt to improve the clarity of the proposed regulation. The current text describes a payment procedure that is used for other regulations promulgated by the Commissioner. The Commissioner has informed the commentator that should problems arise during the implementation of the regulation that a future revision may be made to the regulation to alleviate the commentator's concerns.</p>
<p>(b) The Proposed Regulation Should Be Amended to Permit an Assessment of Less Than Ten Cents Per Insured</p> <p>The commentator asks that the proposed regulation be amended to permit an assessment of less than ten cents per insured. The commentator asserts that a ten cent assessment may be disproportionately burdensome to small premium policies. In addition, the commentator contends that these small premium policies are less likely to suffer from insurance fraud. To correct this situation, the commentator suggests that the proposed regulation add the words "up to" in the first sentence of the proposed regulation.</p>	<p>(b) The Proposed Regulation Should Be Amended to Permit an Assessment of Less Than Ten Cents Per Insured</p> <p>After considering the comment, the Commissioner has decided not to change the language in the proposed regulation. Setting the assessment at a flat ten cents makes the administration of the assessment a straightforward process. Amending the regulation to permit an assessment of less than ten cents would require additional regulations to set forth the criteria for qualifying for a lower assessment. Should the assessment prove to be overly burdensome, future amendments to the regulation will be considered as the Commissioner is amenable to a further</p>

	discussion of this issue after the regulation goes into effect.
<p>(c) The Original Language in the Proposed Regulation that Earmarked the Assessment Funds for the Prosecution and Investigation of Disability Insurance Fraud Should Be Restored</p> <p>The commentator asserts that the language “for the purposes of the prosecution and investigation of disability insurance fraud pursuant to Insurance Code section 1872.85” should be restored to the proposed regulation. The commentator believes that this language would clarify how the assessment funds would be used.</p>	<p>(c) The Original Language in the Proposed Regulation that Earmarked the Assessment Funds for the Prosecution and Investigation of Disability Insurance Fraud Should Be Restored</p> <p>After considering this comment, the Commissioner has decided not to change the language in the proposed regulation. Originally, this language was inserted into the proposed regulation in anticipation of the Legislature amending Insurance Code section 1872.85. However, at this time, the bill proposing the amendment is still pending before the Legislature. As a result, as discussed by another public comment, the proposed language would not conform to the enabling statute, Insurance Code section 1872.85.</p>

Comment No. 7:

Commentator: Scott Kipper, America’s Health Insurance Plans

Date of Comment: July 15, 2004

Type of Comment: Written (email)

Summary of Comment:	Response to Comment: The Commissioner has considered the comment and has not changed the proposed regulations in response to the comment.
<p>(a) A Fixed Date for Payment of the Annual Assessment Should Be Retained In the Proposed Regulation</p> <p>The commentator requests that a fixed date for payment of the assessment be retained in the proposed regulation. The commentator contends that the lack of a payment date creates an unnecessary hardship on insurers.</p>	<p>(a) A Fixed Date for Payment of the Annual Assessment Should Be Retained In the Proposed Regulation</p> <p>After considering this comment, the Commissioner has decided not to change the new language in the proposed regulation. The payment date was deleted in attempt to improve the clarity of the proposed regulation. The current text describes a payment procedure that is used for other regulations promulgated by the Commissioner.</p>

<p>(b) The Proposed Regulation Should Be Amended to Permit an Assessment of Less Than Ten Cents Per Insured</p> <p>The commentator asks that the proposed regulation be amended to permit an assessment of less than ten cents per insured. The commentator asserts that a ten cent assessment may be disproportionately burdensome to small premium policies. In addition, the commentator contends that these small premium policies are less likely to suffer from insurance fraud. To correct this situation, the commentator suggests that the proposed regulation add the words “up to” in the first sentence of the proposed regulation.</p>	<p>(b) The Proposed Regulation Should Be Amended to Permit an Assessment of Less Than Ten Cents Per Insured</p> <p>After considering the comment, the Commissioner has decided not to change the language in the proposed regulation. Setting the assessment at a flat ten cents makes the administration of the assessment a straightforward process. Amending the regulation to permit an assessment of less than ten cents would require additional regulations to set forth the criteria for qualifying for a lower assessment. Should the assessment prove to be overly burdensome, future amendments to the regulation will be considered as the Commissioner is amenable to a further discussion of this issue after the regulation goes into effect.</p>
<p>(c) The Language in the Proposed Regulation Should Specify That the Assessment Funds Will Be Used Solely to Fund Fraud Enforcement Activities</p> <p>The commentator asserts that the proposed regulation should contain language specifying that the funds created by the assessment will be solely used to fund fraud enforcement activities.</p>	<p>(c) The Language in the Proposed Regulation Should Specify That the Assessment Funds Will Be Used Solely to Fund Fraud Enforcement Activities</p> <p>After considering this comment, the Commissioner has decided not to change the language in the proposed regulation. Insurance Code section 1872.85 is clear on its face that the assessment funds will be used for increased investigation and prosecution of fraudulent health insurance claims.</p>

ALTERNATIVES

The Commissioner has determined that no reasonable alternative exists to carry out the purpose for which the regulations are proposed.

MANDATES ON LOCAL AGENCIES OR SCHOOL DISTRICTS

The proposed regulations do not impose any mandate on local agencies or school districts. There are no costs to local agencies or school districts for which Part 7 (commencing with Section 17500) of Division 4 of the Government Code would require reimbursement.